78-633

IN THE

Supreme Court of the United States

October Term, 1978

LOCAL 102 INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

ERNEST ALLEN COHEN
Attorney for Petitioner,
Two Wall Street
New York, N. Y. 10005
(212) 227-5400

MARCHI JAFFE COHEN CRYSTAL
& MINTZ
DAVID JAFFE
JAY A. KATZ
DAVID R. TAXIN
Of Counsel

TABLE OF CONTENTS

Table of Authorities

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Preliminary Statement

The Government in effect has taken the position that confidential communications between clients and attorneys, although innocent on their face,* are not protected by the attorney-client privilege, regardless of the fact that neither the attorney nor the client had knowledge of or participated in a crime, and regardless of the fact that the client's purpose in obtaining legal advice was innocent, as long as the challenged communications, in the light of facts unknown to the client or the attorney, which unknown facts can be deemed relevant to ongoing criminal activity.

* Contrast *In re Doe*, 551 F.2d 899 (2d Cir. 1977), where the communication between attorney and client, unlike the communication in the instant case, on its face revealed the existence of an ongoing crime—the possible bribing of a juror. In the instant case, the communication on its face revealed no more than the possibility of withdrawal of a petition pending before the National Labor Relations Board—a common and lawful event in the absence of corrupt actions.

This position is completely contrary to the principles set forth by this Court in *Clark* v. *United States,* 289 U.S. 1 (1932), the Federal Rules of Evidence,* Treatises,** and the historic purposes behind the attorney-client privilege.

In an apparent attempt to disguise the obvious pitfalls in its legal position, the Government is in the anomalous position of actually impeaching the decision of the Second Circuit, which decision the Government seeks to have this Court affirm. Thus, the Government argues that this Court should rely upon certain allegations which were not found either to be true or to be relevant by the Second Circuit.*** The missing element in the Government's case is a showing of knowledge on the part of Local 102 (hereinafter "the client") of the existence of any ongoing criminal activity. In fact, all that the Government even claims about the client is that it admitted into membership 11 persons who were presented to the client as eligible covered workers. However, this merely evidences the client's performance of a perfectly lawful, required and mandatory

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* See Rule 503(d)(1), which requires a showing of *both knowledge and intent by the client* in order to apply the exception to the attorney-client privilege with respect to communications relevant to ongoing criminal activity.

** See McCormick on Evidence, 2nd ed. 1972, which is discussed in the petition for a Writ of Certiorari, at pages 6-7.

*** Thus, the Government claims that there is "uncontradicted evidence" that the alleged conspiracy included an agreement to admit Fred Lawson and 10 other men to membership in the client. The Second Circuit did not find this to be a relevant fact, or for that matter, a fact at all. The client clearly and explicitly stated that it admitted Lawson and the 10 men, not as a part of any conspiracy whatsoever, but in conformance with its mandatory duty to accept eligible covered workers into membership. The client specifically denied that it had any knowledge whatsoever of any conspiracy, and the Government presented no proof of any such knowledge.

act, the nonperformance of which might be unlawful or might constitute a violation of the collective bargaining agreement.

The Government further argues to this Court that the case is moot, despite the fact that it cites no authority of this Court in support of its position and in fact ignores established precedent of this Court which indicates the contrary, despite the fact that the Government is involved in a criminal trial with the client in the Eastern District of New York, where the illegal disclosure of privileged confidential communications made to the grand jury is intended to be revealed, and despite the fact that this Court has the power to fashion a remedy to protect the client against the unlawful use made before the grand jury by the Government of the privileged confidential communications.

It is respectfully submitted that the Government's suggestion of mootness and the Government's interpretation of the attorney-client privilege are totally without merit. The Government does not dispute the fact that the issues raised herein are of transcendent importance and significance to the legal profession, and to all persons dealing or contemplating dealing with lawyers. Thus, this Court should grant the client's Petition for a Writ of Certiorari, and decide this case on the merits.

The Government's Suggestion of Mootness Ignores Established Precedent of This Court and Is Totally Without Merit.

The constitutional prohibition against deciding questions where no case or controversy exists does not prevent this Court from granting the client's Petition for a Writ of Certiorari, and deciding this case on the merits. This Court has held that where a Governmental action has ad-

versely affected and continues to adversely affect a present interest of private parties, a case or controversy exists and an appeal will not be dismissed as moot. *Super Tire Engineering Company* v. *McCorkle,* 416 U.S. 115 (1974). Additionally, it is established that obedience to the mandate of the Court of Appeals and the judgment of the District Court will not moot a case and cause a party to lose his right to seek a reversal of the ruling. *Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). An analysis of the facts of the case at bar demonstrates that the facts fall squarely within the foregoing clear and established principles, and that therefore the case is not moot.

The pertinent facts of this matter are as follows:

On July 14, 1978, the Government moved to compel David Crystal II, a member of the firm of Marchi Jaffe Cohen Crystal & Mintz, the longstanding general counsel for the client, to testify before a grand jury as to the substance of two confidential conversations had between Sidney Gerstein, Manager of the client, and David Crystal, with reference to a matter scheduled for adversary hearing before the National Labor Relations Board on the following day, which conversations were fully protected from disclosure and use by the attorney-client privilege. The District Court granted the Government's motion, the Second Circuit affirmed, and on September 1, 1978, Justices Powell and Brennan of this Court denied the client (which had intervened to protect its rights), a stay of the order compelling the testimony of David Crystal pending the filing and determination of the client's Petition for a Writ of Certiorari. On September 5, 1978, pursuant to Court order, David Crystal testified before the grand jury as to the two privileged confidential conversations. On September 6, 1978, the client was indicted for conspiring to obstruct,

and obstructing proceedings before the National Labor Relations Board.

The attorney-client privilege protects against both the *disclosure* and *use* of privileged confidential communications. This case has not been rendered moot with respect to either of these protections.

The privileged testimony has thus far only been *disclosed* to the grand jury, whose deliberations are secret. However, further disclosure of the grand jury testimony is likely to occur during the course of the pending criminal trial and, in fact, the Government has announced its intentions to call Mr. Crystal as a witness at the trial, which of course is the predicate for the further disclosure of his grand jury testimony, including the confidential communications. See *Jencks* v. *United States,* 353 U.S. 657 (1957). Thus, although the matter of disclosure of the testimony to the grand jury may be moot, the matter of disclosure of that testimony beyond the grand jury is a continuing controversy between the parties.

Protection against the *use* of the privileged testimony similarly is not moot. The grand jury voted an indictment the day after the privileged testimony was elicited. It would appear that in voting the indictment, the grand jury may have *used* the privileged testimony. If this is the case, the indictment is thereby tainted and must be dismissed as being "the fruit of the poisonous tree". See, e.g., *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *United States* v. *Jones,* 542 F.2d 186 (4th Cir.), *cert. denied,* 426 U.S. 922 (1976) (use of testimony). Thus, should this Court hold that the compelled testimony is protected by the attorney-client privilege, this Court should remand the case to the District Court for a determination of whether or not the grand jury used the illegal evidence in

returning the indictment against the client. Clearly, this Court has the power to fashion such an appropriate remedy to prevent the use of illegal evidence. This Court developed the exclusionary rule to remedy the problem of illegal confessions and illegal searches and seizures by the Government. Illegal evidence is illegal evidence whether obtained by the Government through illegal confessions or illegal searches and seizures or whether obtained by the Government through illegal forced disclosure of confidential communications.

Thus, a continuing controversy exists as to both the *disclosure* of the privileged testimony beyond the grand jury and as to the *use* of the illegal testimony in obtaining a tainted indictment. The parties before this Court are the same parties before the Eastern District of New York, and the issue being litigated in this Court is of critical importance to the question of the validity of the indictment and to the pending criminal trial in the District Court. Thus, there is nothing "abstract, feigned or hypothetical" about the issues in this case. See *Sibron* v. *New York*, 392 U.S. 40, 57 (1968). The Government's action in compelling the disclosure of testimony protected from disclosure and use by the attorney-client privilege and the apparent reliance upon that testimony by the grand jury in voting an indictment, have adversely affected and clearly continue to adversely affect the rights of the client in the criminal proceeding. This Court is not without the ability to prevent further disclosure and to fashion a remedy for the apparent illegal use of such privileged and confidential communications.

In *Super Tire Engineering Company* v. *McCorkle*, *supra*, this Court established the following principles in determining whether or not a case or controversy exists:

> "the challenged governmental activity in the present case is not contingent, has not evaporated, or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties. . . ." 416 U.S. 115, at p. 122.
>
> "where such State action [immediate and direct] or its imminence adversely affects the status of private parties, *the courts should be available to render appropriate relief* and judgments affecting the parties' rights and interests, . . ." 416 U.S. 115, at p. 125. (Emphasis added).

It cannot be disputed that "the challenged governmental activity" is not contingent, but in fact continuing, and that it immediately and directly adversely affects the right of the client herein. Moreover, it is submitted that the adverse effect of the Government's action on the client is even more it immediately and directly adversely affects the rights of the Government's action on the employer in *Super Tire*, where the claim was that eligibility of striking workers for welfare benefits affected the "ongoing collective relationship" between employers and unions, and where this Court refused to moot the appeal despite the fact that the strike in question had terminated prior to appellate review. Thus, under the principles established by this Court in *Super Tire*, this case is not moot, and the Government's suggestion to the contrary, when coupled with the Government's apparent acceptance of the fundamental significance of the issues raised in this case, and the Government's attempt to impeach the findings of the Second Circuit as to the relevant facts, reveals the untenable position in which the Government finds itself in opposing the Petition for a Writ of Certiorari.

In *Mancusi* v. *Stubbs*, *supra*, this Court held that "obedience to the mandate of the Court of Appeals and the judgment of the District Court does not moot this case," at p. 206. This Court relied upon *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437 (1948) and *Dakota County* v. *Glidden*, 113 U.S. 222 (1885) for the proposition that where a defendant merely submits to perform the judgment of the court, he will not lose his right to seek a reversal of that judgment by writ of error or appeal. In the case at bar, David Crystal merely obeyed the mandate of the Court of Appeals and the judgment of the District Court in testifying as to the privileged conversations before the grand jury. The Government suggests that the client's case is moot because a third party witness, David Crystal, testified in compliance with Court order. The rationale of *Mancusi* v. *Stubbs*, *supra*, is even more compelling under these circumstances—the client should not lose its right to seek a reversal of the ruling which seriously affects its rights, because of the forced disclosure of privileged confidential communications by a third party.

In support of its position that this case is moot, the Government ignored established precedent of this Court, and instead cited three totally inapposite circuit court tax cases. (See Memorandum in Opposition, at p. 4.) In each of the cases cited by the Government, documents were subpoenaed by the Internal Revenue Service pursuant to an investigation, and after non-compliance, the Government moved to compel enforcement of the subpoenas. The District Court granted the motions, and the documents were produced pending appellate review of the matters. In each of the cited cases, the further *disclosure* and future *use* of these documents was speculative only, and no criminal proceedings were then involved. However, in the case at bar, the compelled testimony has apparently already been used to obtain an indictment, which is thereby tainted and

must be dismissed, and the Government has announced that it will attempt to adduce evidence of the privileged confidential conversations at the pending trial, which will require further disclosure of the grand jury testimony. See *Jencks*, *supra*. In fact, the case at bar is most similar to a tax case not cited by the Government—*United States* v. *Friedman, et al.*, 532 F.2d 928 (3rd Cir. 1976). In *Friedman*, the taxpayers intervened in the proceeding to prevent their accountant from supplying the Internal Revenue Service with books, records and documents subpoenaed, on the grounds that the IRS summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution. (Here, the client seeks to prevent the further disclosure and to obtain a remedy for the illegal use of confidential communications protected by the attorney-client privilege. The testimony was compelled for the same purpose as in *Friedman*—to gather evidence for use in a criminal prosecution.) The District Court ordered the accountant to produce the materials subpoenaed, and the accountant complied with the Order while the case was on appeal to the Third Circuit. The Government's contention that the case was moot was denied by the Third Circuit:

> "If the taxpayers were to prevail in their contention that all summonses were illegal because they were issued solely to gather evidence for use in a criminal prosecution, then the records acquired from Friedman *would* have been obtained unlawfully. Such a ruling *could* affect the *possible* use of these records in any *subsequent* criminal or civil proceeding brought against the taxpayers. . . . The controversy between the IRS and the taxpayers over these records is still very much alive", at p. 931. (Emphasis added.)

In *Friedman*, the Third Circuit alluded to the *possible* use of tainted evidence in subsequent criminal (or civil) pro-

ceedings. However, the facts in the case at bar militate against a finding of mootness even more than in *Friedman*, because here, the illegal evidence has apparently already been used to obtain an indictment, which is thereby tainted and must be dismissed, and the Government has announced its intentions to call Mr. Crystal as a witness at the trial, which is the predicate for the further disclosure of his grand jury testimony, including the confidential communications. See *Jencks, supra.*

The Government's Claim That the Challenged Communications Are Not Protected by the Attorney-Client Privilege Is Based Upon Allegations Which the Second Circuit Did Not Find to Be Facts Nor to Be Relevant, and Upon a Misreading of Established Precedent of This Court, and if the Government's Position Is Accepted, It Would Radically Diminish the Protection of the Attorney-Client Privilege.

The Government does not deny the significance of the issues raised by the client, or the importance of the attorney-client privilege, yet the position which it espouses would severely emasculate the vitality of that privilege and the confidence which clients would feel free to invest in their attorneys. In addition, it is revealing of the weakness of the Government's position that it relies upon allegations in support of its conclusion, which allegations the Second Circuit did not find to be facts nor to be relevant.

As set forth in the client's Petition for a Writ of Certiorari, at page 4, there was no basis to conclude that the client knew of the alleged crime, was a participant in the alleged crime, or communicated with its attorneys in order to commit or further the alleged crime. The only fact applicable to the client which the Second Circuit deemed pertinent was that "it appears that the attorneys had

been notified that the petition of Local 20408 was to be withdrawn . . .". However, in its Memorandum in Opposition, the Government relied upon one additional allegation which related to the client—the admission of Fred Lawson and 10 other men into membership in the client. Although it is respectfully submitted that this Court need not accord any weight to the additional allegation raised by the Government, nevertheless counsel is impelled to comment upon the allegation because it does not, in any way, warrant abrogation of the attorney-client privilege.

The undisputed evidence in this case clearly revealed that the client and Sidney Gerstein, Manager of the client, had no contact whatsoever with Matthew Eason, or with any of the alleged co-conspirators in the case, with the exception of Sidney Lieberman (and his company Interstate Dress Carriers, Inc.). Lieberman was the manager of an association of employers in collective relations with the client and, in fact, was a signatory of the collective bargaining agreement. He was also the Vice President of an employer, which was a member of that multi-employer bargaining representative. The client was required to deal with Mr. Lieberman in each of his said capacities, pursuant to the collective bargaining agreement. As was usual, the employer advised the client that certain employees were "eligible covered workers" for the purpose of admission into membership in the client pursuant to the collective bargaining agreement. The agreement required union membership after 30 days of covered employment by an employer who was a member of the applicable association of employers. It was admitted by the Government that the client's acceptance into membership of these eligible covered workers was a perfectly lawful act. Indeed, it was undisputed below that it was the client's mandatory duty to accept into membership these eligible covered workers, and, in fact, a failure to do so

by the client could constitute a direct violation of federal labor laws and would be a breach of the collective bargaining agreement. Thus, the Government, unlike the Second Circuit, has inferred criminal conduct by the client from the performance of a perfectly lawful act which was, in fact, required of the client. Surely, the admission of these eligible covered workers adds nothing to the Government's *prima facie* showing of illegality on the part of the client; in fact, had the client failed or refused to admit these eligible covered workers into membership in the client, that action could have constituted a *prima facie* showing of illegality on the part of the client.

The Government critically misread the clear and unambiguous teaching of this Court in *Clark* v. *United States, supra*. The Government claims that *Clark* stands for the proposition that "the privilege does not extend to conversations *relating* to ongoing criminal activity." (Memorandum in Opposition, at p. 4.) (Emphasis added.) Nothing could be further from the truth. In *Clark*, this Court stated that the opponent of the attorney-client privilege would be required to establish a *prima facie* case that the client *abused* the privilege and that the client sought his attorney's advice for the *purpose* of committing or furthering a crime.

> "The privilege takes flight if the relation is *abused*. A client who consults an attorney for advice that will serve him in the commission of a [crime] will have no help from the law." *Clark* v. *United States*, 289 U.S. 1, at p. 15. (Emphasis added)

Otherwise, a client totally innocent of any wrongdoing would have no protection of his innocent privileged, communications with his attorneys, if such communications innocently related to a similar subject matter as an unknown

alleged ongoing crime by others. Thus, it is the client's *knowledge* and *intentions* in consulting his attorney which determine whether the privilege should be abrogated. Indeed, Rule 503(d) (1), Federal Rules of Evidence clearly supports this Court's teaching in *Clark* that it is the client's *knowledge* and *intentions* which are controlling. The great policies behind the attorney-client privilege—encouraging candor and full disclosure by the client to his attorney—would be crippled by a contrary view.

In summary, in order to abrogate the attorney-client privilege as to confidential communications, prior to the admission of privileged testimony, it was incumbent upon the Government to establish a *prima facie* case that the client *abused* the attorney-client privilege by consulting its attorney for the purpose of aiding the client in the commission or furtherance of a crime, or with the client's knowledge that the client's communication related to an ongoing crime. The failure to require a showing of *abuse* of the privilege by the client would radically diminish the protection of the attorney-client privilege where the client innocently discusses a matter with his attorney, which matter, unbeknownst to the client, is related by subject matter to the substance of an unknown alleged ongoing crime allegedly being committed by someone else. This is precisely what the Government has done—it has made no showing that the client *abused* the privilege; instead, it has simply shown that one day prior to an adversary hearing on a representation petition, the client consulted its general counsel with reference to the matter, which matter (or the disposition of which matter) turned out to be related to an unknown alleged ongoing crime being committed by someone else.

The attorney-client privilege is a keystone of confidence invested in attorneys by clients. Such confidence is basic

to our adversary system of justice. The Government must not be permitted to substantially erode such confidence for to do so is to distort and weaken the structure of our adversary system.

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, and that this Court should decide this case on the merits.

Respectfully submitted,

ERNEST ALLEN COHEN
Attorney for Petitioner,
Two Wall Street
New York, N. Y. 10005
(212) 227-5400

MARCHI JAFFE COHEN CRYSTAL
& MINTZ
DAVID JAFFE
JAY A. KATZ
DAVID R. TAXIN
Of Counsel